IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.36/2001

Rajesh Kumar,
presently lodged at
Central Jail Aguada,
Sinquerim, Bardez, Goa. ..... Appellant.

V/s.

State of Goa,
as represented by
Officer-in-Charge,
Colva Police Station,
South Goa. ..... Respondent.

Mr. S.G. Bhobe, Advocate appointed under the Legal Aid Scheme, for the Appellant/Accused.

Mr. S.N. Sardessai, Public Prosecutor for the State/ Respondent.

CORAM : P.V. HARDAS, J.

DATE : MARCH 6, 2003.

ORAL JUDGMENT :

The appellant being aggrieved by his conviction for an offence punishable under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter, referred to as 'the NDPS Act') and sentence of 10 years Rigourous Imprisonment and payment of fine of Rs.1,00,000/-, in default, Simple Imprisonment for six months, passed by the Special Judge, NDPS Court, Mapusa, by Judgment dated 29.3.2001, in Special Criminal case No. 16/2000, has filed the present appeal.

2. The facts, necessary for the decision of the present appeal, are set out hereunder:

PW.4 PI, Nelson Albuquerque was attached to Colva Police Station, as Officer Incharge. On 19.1.2000 at 23.30 hours he received specific and reliable information that one Rajesh Kumar of medium built residing in the house of one Kaitan, behind Sukhsagar Hotel was dealing with narcotic drugs, near Jimmy Cottage at Colva. PW.4 reduced the said information into writing and a copy of the same, with covering letter was sent to the Dy. Superintendent of Police, Margao. The copy of the said information sent to the Dy.S.P. Margao is at Exhibit PW.4/B. The information reduced into writing by PW.4 PI Nelson Albuquerque is at Exhibit PW.4/C. PW.4 PI Nelson Albuquerue secured presence of two panchas, namely Selvin Goes and one Frankline Paul. PW.4 PI Nelson Albuquerque informed the said panchas regarding the information which he had received, as well as sending copy of the said information to the Dy.S.P. Margao. The panchas were introduced to the members of the raiding party and on 20.1.2000 at 00.10 hours, the raiding party consisting of the Police Officer and the Panchas left for raid. The raiding party had carried with them a kit box containing weighing, packing, sealing material as well as torches. PW.4 PI Nelson Albuquerque carried with him a seal of Police Station, Colva with ‘Ashoka Emblem’.

The members of the raiding party reached near Star Beach Resort and walked for a distance of about 100 metres. There they saw a person whose identity matched with the person described earlier. The said person was waiting near a compound wall. PW.4 PI Nelson Albuquerque introduced himself to the said person and asked him his name. The said person told his name as 'Rajesh Kumar'. PW.4 then apprised him about the specific and reliable information which he had received. PW.4 PI Nelson Albuquerque also apprised him about his right to be searched before a Gazetted Officer or a Magistrate. PW.4 PI Nelson Albuquerque give him offer to search the members of the raiding party, including the panchas. The said person, however, declined both the said offers by agreeing to be searched by PW.4 PI Albuquerque in presence of the panchas. The said persons, during the trial had been identified as the accused, who was wearing blue jean and navy blue colour T-shirt. The jean pant had five pockets. On request of PW.4, the accused handed over to him from his pant pocket one polythene bag containing some cylindrical black pieces numbering about 25, which were in the left hand side pant pocket. PW.4 PI, Albuquerque stated that it was charas. PW.4 PI Albuquerque thereupon questioned him regarding his possession of drugs, but the accused did not reply. PW.4 then weighed the said pieces of charas and it was found that it weighed 220 grams. The said pieces of charas were then put in an envelope, labelled,

packed and sealed and the envelope was signed by two panchas, PW.4 PI Albuquerque and the accused. The accused was then searched, but nothing incriminating was found. The clothes of the accused were seized. The accused was informed that possessing of drugs, without licence, was an offence and after informing the grounds of arrest, he was taken into custody . The panchanama at Exhibit PW.3/A was drawn. PW.4, PI Albuquerque then filed his complaint at Exhibit PW.4/A and by Memo at Exhibit PW.4/D deposited the said muddemal articles in the 'Malkhana' in possession of PW.6 Ashok Naik. PW.6 Ashok Naik kept the sealed packets as well as specimen seal impression letter at Exhibit PW.1/A under lock and key and took an entry in the Muddemal Register against Entry No.3/2000. PW.4 PI Albuquerque also returned back the seal. PW.6 Ashok Naik thereafter, on the next day, at about 9.30 a.m. personally went to the Crime Branch, CID, Panaji and handed over the sealed packet along with specimen seal letter Exhibit PW.1/A for onward transmission for analysis. The said muddemal was received by PW.2 Manohar Joshi, who at the relevant time was working as Scientific Assistant, CID, Crime Branch, Panaji. PW.2 Manohar Joshi acknowledged the receipt on the covering letter marked Exhibit PW.1/A. He placed the said covering letter and the muddemal articles in a cupboard under lock and key and forwarded the muddemal articles to the Director of Food and Drugs Administration, Panaji through H.C. Buccle No.1631 for

examination. He received the examination report as well as the balance quantity of charas and forwarded the same to the PSI, Colva Police Station vide letter which is at Exhibit PW.2/B. PW.1 Mahesh Kaissare who was working as Junior Scientific Officer in the Directorate of Food and Drugs Administration, received the sample and after comparing the seals, selected 5 sticks at random weighing 45 grams as representative sample and analysed each stick individually by taking one gram of substance from each piece. PW.1 Mahesh Kaissare, as per his report at Exhibit PW.1/C, found the substance tested by him positive for charas.

3. After completion of the investigation, a charge-sheet was filed against the appellant. Vide Exhibit-3, the learned Special Judge, NDPS Court, at Mapusa framed a Charge against the accused for an offence punishable under Section 29(b)(ii) of the NDPS Act. The appellant/accused pleaded not guilty vide his statement at Exhibit-4 and claimed to be tried. The prosecution in support of its case examined six witnesses. The defence of the appellant/accused is that he has been falsely implicated in the case as he was not in good books with a friend of PW.4 PI Nelson Albuquerque and the said friend had given threats to accused that he would be driven out of Colva or Goa.

4. Mr. S.G. Bhobe, learned Counsel who has

been appointed under the Legal Aid Scheme to represent the accused has ably argued on behalf of the appellant/accused. According to the learned Counsel, PW.1 Mahesh Kaissare has not examined the entire quantity of charas that was seized. He has examined only 45 grams of charas and, therefore, the charge in so far as the appellant/accused being in possession of 220 grams of charas is bound to fail. It is next urged by Mr. Bhobe, learned Counsel appearing on behalf of the appellant/accused that there is no compliance of Section 50 of the NDPS Act and the appellant/accused deserves to be acquitted. Mr. S.N. Sardessai, learned Public Prosecutor appearing on behalf of the State has urged before me that prior to the Amendment of the NDPS Act, small quantity was defined as 10 grams and, therefore, in the present case even if PW.1 Mahesh Kaissare has examined only 45 grams, the appellant cannot derive any advantage as 45 grams is not a small quantity. He next submitted that there is full compliance of Section 50 of the NDPS Act and, therefore, the appeal deserves to be dismissed.

5. With the assistance of the learned Counsel for the parties, I have perused the evidence and the documents in the case. It is true that PW.1 Mahesh Kaissare who, at the relevant time, working as Jr. Scientific Officer has admitted that he had received 220 grams of charas. He has also admitted that he had

examined only six sticks weighing 45 grams as representative sample by taking one gram of substance from each piece. Thus on the basis of the report at Exhibit PW.1/C, the prosecution has been able to establish that the accused was in possession of charas weighing 45 grams. Under the provisions of the NDPS Act, prior to Amendment, in order to get the benefit of lesser sentence, the small quantity in respect of charas was 10 grams. Undisputedly, in the present case, the prosecution has been able to establish that the accused was in possession of 45 grams of charas. Therefore, the lapse on the part of PW.1 Kaissare in examining only 45 grams of charas, does not enure to the benefit of the present appellant/accused. The submission of the learned Counsel for the appellant in this behalf does not merit any consideration.

6. PW.3 Selvin Goes is a panch witness. He states that after the accused was accosted, he was told that a Magistrate or a Gazetted Officer would be brought for his search, but Rajesh Kumar who is the accused before the Court declined the offer. In cross examination, he has given the following admissions :

(i) PSI told the accused whether he could be searched before a Gazetted Officer or a Magistrate but the accused stated no.

(ii) the accused stated "No."

PW.3 has denied the suggestion in cross examination that no offer to be searched before the Gazetted Officer or Magistrate was given to the accused. In the panchanama Exhibit PW.3/A, it is stated that before commencement of the search, PSI Nelson Albuquerque informed the accused that he has right to be searched before a Gazetted Officer who was present or a Magistrate. PW.4 PI Nelson Albuquerque in his evidence has stated "I gave him the offer that he has right to be searched before a Gazetted Officer or a Magistrate. I also gave him the offer to search members of the raiding party, including the panchas however, the accused declined both the offers. The accused agreed to be searched by me in presence of panchas". In the cross examination, PW.4 PI Nelson Albuquerque has admitted "In declining the offers the accused only said 'you can search me'."

7. There is nothing in the cross examination of either the panch witness PW.3 Selwin Goes or PW.4 PI Nelson Albuquerque to discard their version that an offer was given to the accused of being searched either in presence of a Gazetted Officer or a Magistrate. At the conclusion of the cross examination, according to me, both these witnesses have emerged as truthful witnesses. Of course, there is slight variance in the evidence of PW.3 panch and PW.4 PI Albuquerque in the use of exact words used to convey the right to the

appellant/accused. Slight variance here or there does not materially detract from the consideration that the appellant/accused was apprised of his right of being searched either before a a Gazetted Officer or a Magistrate. Such a slight variance would not necessarily lead to an inference of non-compliance of the mandatory provisions of Section 50 of the NDPS Act. Substantially, the accused was communicated that he had a right of being searched either before a Gazetted Officer or a Magistrate. Unless the words used in communicating the right are extremely vague so as to lead to an inference that the accused was not apprised of his right, and therefore, on slight variation or discrepancy, the inference of non-compliance cannot be drawn. I, therefore, hold that Section 50 of the NDPS Act has been complied with and the accused was informed of his right of being searched before a Gazetted Officer or a Magistrate.

8. The accused has taken a defence that he was falsely implicated in this case at the behest of a friend of PW.4 PI Albuquerque and that the friend of PW.4 PI Albuquerque had threatened the appellant that he would be driven out of Colva or Goa. Apart from this assertion in the statement under Section 313 of the Code of Criminal Procedure, the appellant/accused has not put this defence to PW.4 PI Nelson Albuquerque in the cross examination. The name of the friend is

also not disclosed by the appellant in his statement under Section 313 of the Cr.P.C. In such circumstances, defence of the appellant/accused deserves to be outrightly rejected and needs no consideration.

9. After giving my anxious consideration to the evidence on record, I am satisfied that the prosecution has been successful in establishing the offence against the appellant/accused beyond reasonable doubt. Learned trial Court has appreciated the evidence and has rightly come to the conclusion regarding the guilt of the appellant/accused. The Judgment of the learned trial Court is, therefore, needs no interference in the appeal. The appeal is thus devoid of any substance and deserves to be dismissed.

10. Criminal Appeal No.36/2001 is, accordingly, dismissed. The conviction and sentence as passed by the learned Special Judge, NDPS Court, Mapusa in Special Criminal Case No.16/2000 is maintained. The appellant/accused is in custody and, therefore, a copy of this Judgment be sent to the appellant/accused.

P.V. 6HARDAS, J.

ssm.